



JOINT STATEMENT OF

**LISA O. MONACO
ASSISTANT ATTORNEY GENERAL
FOR NATIONAL SECURITY
U.S. DEPARTMENT OF JUSTICE**

**JOHN C. (CHRIS) INGLIS
DEPUTY DIRECTOR
NATIONAL SECURITY AGENCY**

**ROBERT S. LITT
GENERAL COUNSEL
OFFICE OF DIRECTOR OF NATIONAL INTELLIGENCE**

**BEFORE THE
PERMANENT SELECT COMMITTEE ON INTELLIGENCE
UNITED STATES HOUSE OF REPRESENTATIVES**

**AT A HEARING CONCERNING
“FISA AMENDMENTS ACT REAUTHORIZATION”**

**PRESENTED ON
DECEMBER 8, 2011**



Joint Statement of

**Lisa O. Monaco
Assistant Attorney General
for National Security
U.S. Department of Justice**

**John C. (Chris) Inglis
Deputy Director
National Security Agency**

**Robert S. Litt
General Counsel
Office of Director of National Intelligence**

**Before the
Permanent Select Committee on Intelligence
United States House of Representatives**

**At a Hearing Concerning
“FISA Amendments Act Reauthorization”**

**Presented on
December 8, 2011**

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(U) Recent FISC Opinion

~~(TS//SI//NF)~~ On October 3, 2011, the FISC issued an opinion addressing the Government's submission of replacement certifications under section 702. *In re DNI/AG Certification 2009-C, et. al.*, [REDACTED], Mem. Op. The FISC approved most of the Government's submission. It upheld NSA's and FBI's targeting procedures, CIA's and FBI's minimization procedures, and most of NSA's minimization procedures. Nevertheless, the FISC denied in part the Government's requests because of its concerns about the rules governing the retention of certain non-targeted Internet communications acquired through NSA's upstream collection. The FISC's exhaustive analysis of the Government's submission, like its other decisions, refutes any argument that the court is a "rubber stamp," and demonstrates the rigorous nature of the oversight it conducts.

~~(TS//SI//NF)~~ As described above, upstream collection allows NSA to acquire, among other things, communications about a target where the target is not itself a communicant. In doing so, NSA uses [REDACTED] that are reasonably designed to screen out communications that are wholly domestic in nature, in accordance with section 702's requirements. Although reasonably designed to accomplish this result, [REDACTED] are not perfect. In addition, upstream collection devices acquire Internet "transactions" that include tasked selectors. Such a transaction may consist of a single communication (a "single-communication transaction," or SCT) or multiple communications sent in a single transaction (a "multi-communication transaction," or MCT) [REDACTED]

[REDACTED] In such instances, upstream collection acquires the entire MCT, which in all cases will include a communication to, from, or about a tasked selector but in some cases may also include communications that are not about a tasked selector and may have no relationship, or no more than an incidental relationship, to the targeted selector. Thus although upstream collection only targets Internet communications that are not between individuals located in the United States and are to, from, or about a tasked account, there is some inevitable incidental collection of wholly domestic communications or communications not to, from, or about a tasked account that could contain U.S. person information. Based on a sample reviewed by NSA, the percentage of such communications is very small (about .02%), but given the volume of the upstream collection, the FISC concluded that the actual number of such communications may be in the tens of thousands annually.

~~(TS//SI//NF)~~ The FISC upheld NSA's continued upstream acquisition of Internet communications under section 702 even though it includes the unintentional acquisition of wholly domestic communications and the incidental acquisition of MCTs that may contain one or more individual communications that are not to, from, or about the tasked selector. *See id.* at 74, 78-79. The FISC also reaffirmed that the acquisition of foreign intelligence information under section 702 falls within the foreign intelligence exception to the warrant requirement of the Fourth Amendment, and confirmed that nothing had disturbed its "prior conclusion that the government is not required to obtain a warrant before conducting acquisitions under NSA's targeting and minimization procedures." *Id.* at 69.

~~(TS//SI//NF)~~ The FISC determined, however, that the minimization procedures governing *retention* of MCTs were inconsistent with the requirements of section 702. The FISC found that the Government had not fully explored options regarding data retention that would be more protective of U.S. persons, and that the FISC thus could not determine that the Government's minimization procedures satisfied FISA's requirement that such procedures be "reasonably designed" to minimize the retention of protected U.S. person information. The FISC further held that, although the Fourth Amendment's warrant requirement was not implicated, in light of NSA's proposed procedures for handling MCTs, NSA's proposed acquisition and minimization procedures did not satisfy the Fourth Amendment's reasonableness requirement. The FISC recognized, however, that the Government may be able to "tailor the scope of NSA's upstream collection, or adopt more stringent post-acquisition safeguards, in a manner that would satisfy the reasonableness requirement of the Fourth Amendment," and suggested a number of possibilities as to how this might be done. *Id.* at 61-63, 78-80.

~~(TS//SI//NF)~~ On October 31, 2011, after extensive consultations among the Department, ODNI, and NSA, the Attorney General submitted amended minimization procedures to the FISC addressing the deficiencies noted by the court. These amended procedures continue to allow for the upstream collection of MCTs; however, they also create more rigorous rules governing the retention of MCTs as well as NSA analysts' exposure to, and use of, non-targeted communications. On balance, NSA believes that the impact of these procedures on operations is acceptable as a necessary requirement in order to continue upstream collection, and that these procedures will allow for continued useful intelligence collection and analysis. On November 30, the FISC granted the Government's request for approval of the amended procedures, stating that, with regard to information acquired pursuant to 2011 certifications, "the government has adequately corrected the deficiencies identified in the October 3 Opinion," and that the amended procedures, when "viewed as a whole, meet the applicable statutory and constitutional requirements."

(U) The Government has provided copies of the opinions and the filings by the Government to this Committee, and the Government will continue to inform the Committee about developments in this matter.

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